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No. 86-1368

In the Supreme Court of the United States

OCTOBER TERM, 1986

JIN K. LEE, PETITIONER

v.

JAMES H. WEBB, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded in this Title VII case that the district court's findings of fact on the question of illegal racial motivation were not clearly erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-10a) is unreported. The opinion of the district court (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1986. On January 12, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 20, 1987. The petition was filed on February 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native of China and a citizen of the United States, was employed at the Alameda Naval Air Station from 1946 until his retirement in 1980. In 1959 he was promoted from aircraft mechanic to a position now referred to as Quality Assurance Specialist. On November 16, 1976, petitioner applied for a vacancy as an Aircraft

Examiner (WD-8602-06), under promotional opportunity number 12-76 (Pro-Op OC-12-76). Pet. App. 2a, 8a.[1] Petitioner's application was considered in accordance with the standard procedures applicable to promotion decisions. First, a "rating panel" issued a written evaluation of each applicant, assessing the candidate's qualifications with respect to a uniform set of criteria established by regulations ("crediting plan"). Petitioner received a score of 19.5. The panel then referred to the selecting officer the applicants with the highest scores; that group included two Asians and did not include anyone who scored below 20.5. The selecting officer ultimately made five appointments from that group of recommended applicants—two Hispanic people, two white people and one black person. Of the persons appointed, the lowest rating score was 22. Pet. App. 2a-3a, 8a.

One of the members of the rating panel that considered petitioner's application was Charles Morris. Morris assigned petitioner a score of 20. The other member of the panel assigned petitioner a score of 19. Petitioner was not referred to the selecting officer for appointment, as his composite score of 19.5 was one point lower than that of any person referred to the selecting officer (and 2.5 points lower than that of any person actually selected for the vacant positions). Pet. App. 9a.

2. Petitioner filed this suit, alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (a).[2] To support his claim of racial discrimination, peti-

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[1] Petitioner also applied for another vacancy in a permanent position and, on several occasions, applied to be detailed to temporary vacancies in Engine and Examiner (E & E) positions, but he makes no claim in this Court about those applications. See Pet. App. 2a, 8a.

[2] 42 U.S.C. 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with

tioner relied principally on his allegation that after the ratings had been made and petitioner requested a temporary assignment in the E & E Department,[3] Morris told him: " 'Lee, you wouldn't stand a "Chinaman's" chance [of getting into the E & E position]' " (Pet. 5, 11).[4]

Following trial, the district court dismissed the complaint. The court found (Pet. App. 4a) that although petitioner had established a prima facie case of illegal race discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the highly standardized process that resulted in the selection of persons with superior ratings amounted to a legitimate, nondiscriminatory reason for the challenged promotion decision. The district court also rejected petitioner's contention that Morris' racial reference constituted evidence of discrimination in Morris' rating decision. As the court noted, Morris rated petitioner higher than did the other member of the rating panel (Pet. App. 3a). The district court thus concluded that plaintiff had failed to carry the burden of proving intentional discrimination (*id.* at 3a-4a).

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respect to this compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[3] The record indicates that temporary assignments were made from among those with the highest scores. Petitioner had a lower score than anyone selected for the temporary assignments he sought. See. Pet. App. 8a; Tr. 21-22, 51.

[4] In testimony at an EEOC hearing that was introduced into evidence at the trial in this case, petitioner characterized Morris' remark as follows (Tr. 56): "He make a joke, or * * * I take it as a joke."

3. The court of appeals affirmed, holding that the district court had decided "the question of discrimination based on the entire case" and its findings were not clearly erroneous (Pet. App. 7a-10a).

ARGUMENT

The decision of the court of appeal is correct and does not conflict with any decision of this Court or of any other court of appeals. In any event, as this case turns on factual findings in which both courts below concurred, further review by this Court is not warranted.

1. In Title VII cases involving allegations of disparate treatment the ultimate question is the factual issue of defendant's motivation. *United States Postal Service Board of Governors* v. *Aikens,* 460 U.S. 711, 714 n.3 (1983) ("the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves"). The ultimate burden of persuasion is upon the plaintiff; this burden never shifts to defendant. Where, as here, the trial court evaluates all of the evidence presented by both parties and reaches a conclusion on the factual issue of motivation, appellate review is limited to determining whether the findings of fact are clearly erroneous. *Anderson* v. *City of Bessemer City,* 470 U.S. 564 (1985). See *City of Pleasant Grove* v. *United States,* No. 85-1244 (Jan. 21, 1987), slip op. 9-10. In this case, as both courts below held, there was ample support in the record for the finding that respondent did not have a discriminatory motive.

2. There is no merit to petitioner's contention (Pet. 7) that the model of proof established in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), should be disregarded. Petitioner bases his argument on the contention that the record in this case con-

tains "direct proof" of racial animus. But, both courts below found that there was no evidence of racial animus in the promotion decision. And this Court has never held that the mere *presentation* of "direct evidence" shifts the burden of proving illegal motivation from the plaintiff to the defendant. In *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. at 714 n.3, the Court stated that whether the evidence is direct or circumstantial, the "trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." Moreover, in *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 8, where direct evidence established that gender was a controlling factor in a promotion decision, the Court, citing *McDonnell Douglas*, stated: "Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision;" if the defendant articulates such a reason, "the burden shifts to the plaintiff to prove that the employer's justification is pretextual * * *."[5]

3. Petitioner contends that the Ninth Circuit's decision in this case conflicts with decisions in the Eleventh Circuit. The Eleventh Circuit holds that where a plaintiff establishes its prima facie case by direct evidence of discriminatory motive for the challenged action, the employer must carry a preponderance burden rather than

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[5] The suggestion in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985), that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination" arose in a wholly different context. Motive was not at issue in *Thurston*. The Court held that since defendant was utilizing a facially-proscribed classification, defendant could not justify its action by articulating a "legitimate, nondiscriminatory reason" but would have to justify its discrimination by establishing one of the statutory defenses such as " 'bona fide occupational qualification' " (*id.* at 122).

simply the burden to articulate a legitimate non-discriminatory reason, in order to prevail. *Wilson* v. *City of Aliceville*, 779 F.2d 631, 634 (11th Cir. 1986); *Thompkins* v. *Morris Brown College*, 752 F.2d 558, 563 (11th Cir. 1985); *Miles* v. *M.N.C. Corp.*, 750 F.2d 867, 875 (11th Cir. 1985); *Bell* v. *Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983); *Lee* v. *Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982). Petitioner correctly notes that the court of appeals in this case explicitly declined to adopt the Eleventh Circuit rule (Pet. App. 10a). However, the disagreement between the Circuits on this issue of burden shifting under Title VII arises only from dicta in the decision of the court below, and thus does not support the granting of the petition.

The rationale for the Eleventh Circuit rule is that where direct evidence that the challenged action was based on discriminatory motive is "accepted by the trier of fact, the ultimate issue of discrimination has been proved." *Miles* v. *M.N.C. Corp.*, 750 F.2d at 875; *Bell* v. *Birmingham Linen Service*, 715 F.2d at 1557; *Lee* v. *Russell County Bd. of Educ.*, 684 F.2d at 774-776. Where a trial judge finds that certain evidence directly demonstrates a discriminatory motive for the challenged conduct, there is no need to draw further inferences in order to conclude that the discrimination occurred. Thus, the defendant cannot prevail by merely going forward to articulate a legitimate non-discriminatory reason for its action, but must necessarily prove his legitimate motivation by a preponderance of the evidence. *Ibid.*

The circumstances necessary to trigger the Eleventh Circuit rule, were it the governing law, are not presented here. The racial references by Morris, which petitioner initially took as a joke, were not accepted by the district court as direct evidence of discriminatory motivation in the promotion process. In the context of all the facts, including the fact that Morris rated petitioner higher than the other person who rated him, the district court concluded that there

was "no evidence" that Mr. Morris rated petitioner in a discriminatory manner. Under the Eleventh Circuit's approach, it is the trier of fact's acceptance of the direct evidence as establishing discriminatory motivation of the challenged action that justifies placing a heavier burden on the defendant. *Miles* v. *M.N.C. Corp.*, 750 F.2d at 875; *Bell* v. *Birmingham Linen Service,* 715 F.2d at 1557; *Lee* v. *Russell County Bd. of Educ.*, 684 F.2d at 774-776. The district court's rejection in this case of petitioner's evidence as not probative on the ultimate issue of discrimination certainly was not clearly erroneous, and thus the court of appeals' rejection of the Eleventh Circuit rule was dicta not meriting the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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